

Supreme Court, U. S.  
**FILED**

OCT 18 1977

MICHAEL RODAK, JR., CLERK

**In The Supreme Court  
of the  
United States**

**TERM, 1977**

**No. 77-570**

**Bernecia E. Avery, *Petitioner***

**v.**

**New England Telephone and  
Telegraph Company**

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

Norman J. Bernstein, Esq.  
Londonderry, Vermont 05148  
*Counsel of Record for Petitioner*

**Paul Douglass**

**ATTORNEY & COUNSELOR AT LAW**

**West Pawlet, Vermont 05775**

**United States of America**

**IN THE  
SUPREME COURT OF THE UNITED STATES**

\_\_\_\_\_ Term, 1977

No. \_\_\_\_\_

**Bernecia E. Avery, Petitioner**

**v.**

**New England Telephone and Telegraph  
Company**

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

To the Honorable, the Chief Justice and Associate Justices of the  
Supreme Court of the United States:

Bernecia E. Avery, the petitioner herein, prays that a writ of  
certiorari be issued to review the judgment of the United States  
Court of Appeals for the Second Circuit on May 24, 1977.

**A. OPINIONS BELOW**

1. The judgment dated and filed May 24, 1977 (File No. 77-7143) of the United States Court of Appeals for the Second Circuit is printed as Appendix A hereto.
2. The memorandum and order of the United States District Court for the District of Vermont, dated December 23, 1976 (File No. 76-223) is printed as Appendix B hereto.

### **B. JURISDICTION**

1. The judgment of The United States Court of Appeals was entered on May 24, 1977. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(a).

### **C. QUESTION PRESENTED**

Whether it is lawful for a telephone company in a monopoly position to disconnect telephone service of an aged (84) woman who is a semi-invalid, living alone and of meager means, when the amount due, after crediting a large deposit exacted of her, was less than ten (\$10) dollars and no personal contact was made with her prior to disconnect.

### **D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. 14th Amendment to the U. S. Constitution.
2. 42 U.S.C. section 1983.

### **E. STATEMENT OF THE CASE**

1. The case is aptly summarized in the memorandum and order of the District Court - Appendix B herein.
2. As brought out in the hearing on the application for temporary restraining order on October 28, 1976 in the District Court, petitioner owed \$7.73 when her phone service was disconnected. No contact was made by the phone company with petitioner prior to disconnection.
3. Petitioner's life was twice placed in jeopardy after the disconnection and prior to suit, due to her disability and infirmity and virtual loss of contact with the outside world. She suffered the attendant fear and anguish from such loss.

### **F. THE RULINGS BELOW**

The District Court (affirmed by the Court of Appeals) relied solely on Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) to dismiss the complaint on motion of defendant.

### **G. REASONS FOR GRANTING THE WRIT**

1. The facts and issues of the Jackson case are markedly different from those herein. For petitioner, phone service is a vital necessity.
2. Goss v. Lopez, 419 U.S. 565 overturns the statement in "Jackson" that there is no constitutionally protected right to continue utility service once that service has been furnished. See Dawes v. Philadelphia Gas Company 421 f. supp. 806, 816 (1976)
3. Petitioner's fundamental rights of life, liberty and property were blatantly deprived and she should have access to the federal courts for redress of wrongs and damages.

### **CONCLUSION**

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

BERNECIA E. AVERY,  
Petitioner

by

Norman J. Bernstein, Esq.  
Counsel

**AFFIDAVIT OF SERVICE  
AND APPEARANCE**

The undersigned hereby enters his appearance in the above captioned matter and affirms that he served the respondent company by mailing three copies of the foregoing to counsel for respondents, Richard H. Wadnams, Jr. of Pierson, Affolter & Amidon, 253 South Union Street, Burlington, Vermont 05401, postage prepaid on the \_\_\_\_\_ of August, 1977.

\_\_\_\_\_  
Norman J. Bernstein, Esq.  
Londonderry, Vermont 05148

Sworn to and subscribed to before me

this \_\_\_\_\_ day of August, 1977.

\_\_\_\_\_, Notary Public

**Appendix A**  
**United States Court of Appeals**  
FOR THE  
**SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of May one thousand nine hundred and seventy-seven.

Present: HON. WALTER R. MANSFIELD  
Circuit Judge  
HON. EDMUND L. PALMIERI  
HON. RUSSELL E. SMITH  
District Judges

~~Circuit Judges~~

Bernecia E. Avery,

Plaintiff-Appellant

v.

New England Telephone and Telegraph Company,

Defendant-Appellee.

77-7143

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is dismissing the complaint be and it hereby is affirmed. The court lacks jurisdiction over the subject matter, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The complaint fails to allege the necessary state action required to set forth a claim pursuant to 42 U.S.C. §1983.

*Walter R. Mansfield*  
Walter R. Mansfield, U.S.C.J.

*Edmund L. Palmieri*  
Edmund L. Palmieri, U.S.D.J.

*Russell E. Smith*  
Russell E. Smith, U.S.D.J.



Appendix B

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Bernecia E. Avery )  
v. ) Civil Action  
New England Telephone and )  
Telegraph Company ) File No. 76-223

MEMORANDUM AND ORDER

The plaintiff has brought this action seeking declaratory, injunctive and monetary relief against the defendant corporation. She alleges that the defendant improperly disconnected her telephone service for nonpayment of her monthly bills. She claims that the defendant's actions have cut her off from the necessities of life, interfered with her social life, and endangered her health. She alleges that the defendant has thus deprived her of civil and constitutional rights under the United States and Vermont constitutions and statutes.

On October 28, 1976, the case came on for a hearing on the plaintiff's request for a temporary restraining order. At that time the plaintiff sought immediate restoration of telephone service. The court denied the application on the grounds that the plaintiff had not satisfactorily established facts which would permit the court to grant the relief requested. The defendant has now moved to dismiss the plaintiff's complaint on the grounds that the defendant's conduct does not constitute state or governmental action and the plaintiff has not exhausted her administrative remedies provided by the Vermont Public Service Board. The plaintiff has responded to the motion by asserting that her life is being threatened by the disconnection of telephone service, she is

being discriminated against on account of her age, sex, physical and mental condition, and her financial and class status in that the defendant has allowed other customers to run up larger bills before disconnecting their service, and she could not seek administrative redress because there were no tariffs in effect at the time her telephone was disconnected.

Given the liberal interpretation to which it is entitled on a motion to dismiss, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), the plaintiff's complaint appears to assert a deprivation of her 14th Amendment rights to due process, in violation of 42 U.S.C. § 1983, and a pendent claim that her rights under Vermont law have been violated. The plaintiff, however, has failed to allege the requisite state involvement for a valid claim under § 1983. The mere fact that the defendant is a state-regulated corporation is insufficient to establish the existence of this essential ingredient in the absence of an allegation that the State of Vermont, acting through its agents or officials, in some way placed its "imprimatur" on the defendant's practices. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). With respect to the allegations that the defendant has violated the plaintiff's rights under the Constitution and laws of the United States, the complaint fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

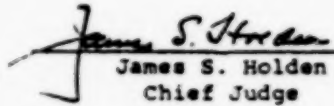
It is also clear that because the plaintiff has failed to state a federal claim the pendent state law claims

Filed December 23 1976  
George L. LaViolette  
Duty Clerk

contained in the complaint must also be dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966); see Aldinger v. Howard, \_\_\_ U.S. \_\_\_ 49 L.Ed.2d 276, 96 S.Ct. 2413 (1976).

Accordingly, it is ORDERED: That the motion of the defendant to dismiss the complaint is granted.

Dated at Rutland, in the District of Vermont, this  
23<sup>rd</sup> day of December, 1976.

  
James S. Holden  
Chief Judge

MAR 14 1978

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT  
OF THE  
UNITED STATES

TERM, 1977

No. 77-570

BERNECIA E. AVERY, Petitioner

V.

NEW ENGLAND TELEPHONE AND TELEGRAPH  
COMPANY, Respondent

BRIEF OPPOSING PETITION FOR A  
WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE UNITED STATES

Richard H. Wadhams, Jr., Esq.  
Pierson, Affolter & Wadhams  
253 South Union Street  
Burlington, VT 05401  
Counsel of Record for Respondent

IN THE  
SUPREME COURT FOR THE UNITED STATES

\_\_\_\_\_  
TERM, 1977

BERNECIA E. AVERY, Petitioner

V.

NEW ENGLAND TELEPHONE AND TELEGRAPH  
COMPANY, Respondent

BRIEF OPPOSING PETITION FOR A  
WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE UNITED STATES

To the Honorable, the Chief Justice and  
Associate Justices of the Supreme Court  
of the United States:

New England Telephone and Telegraph  
Company, the Respondent herein, opposes  
the Petition for Writ of Certiorari filed  
by petitioner Bernecia E. Avery, as  
follows.

ARGUMENT

Respondent filed in the United States  
District Court for the District of Vermont  
a Motion to Dismiss the Complaint under  
Rule 12(b)(1) and 12(b)(6) for lack of  
jurisdiction over the subject matter and  
for failure of the plaintiff's complaint  
to state a claim upon which relief can  
be granted. In its December 23, 1976  
Memorandum and Order that Court granted  
said Motion and held in part as follows:



"Given the liberal interpretation to which it is entitled on a motion to dismiss, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), the plaintiff's complaint appears to assert a deprivation of her 14th Amendment rights to due process, in violation of 42 U.S.C. §1983, and a pendent claim that her rights under Vermont law have been violated. The plaintiff, however, has failed to allege the requisite state involvement for a valid claim under §1983. The mere fact that the defendant is a state-regulated corporation is insufficient to establish the existence of this essential ingredient in the absence of an allegation that the State of Vermont, acting through its agents or officials, in some way placed its "imprimatur" on the defendant's practices. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974)."

In Jackson, the Supreme Court faced a claim by a customer of an electric utility company that her Fourteenth Amendment rights to due process were violated when her electric service was terminated without a prior hearing. The Court held:

"Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself converted its action into that of the State for the purposes of the Fourteenth Amendment. Nor does the fact that the regulation is

extensive and detailed, as in the case of most public utilities, do so." 419 U.S. at 350. (Citations omitted.)

The Supreme Court went on to reject arguments that the utility's acts were state action on theories that (1) the State had granted it a monopoly, 419 U.S. at 351-52, (2) the utility provided an essential public service and thereby performed a "public function," 419 U.S. at 352-54, (3) the State of Pennsylvania had "specifically authorized" the termination practice, 419 U.S. at 354-57, and (4) there was a symbiotic relationship between the State and the utility. 419 U.S. at 357-58.

The Supreme Court also made it clear that its decision applied to regulated telephone companies. In footnote 7, the Court held:

"Enterprises subject to the same regulatory system as Metropolitan are enumerated in the definition of "public utility" contained in Pa Stat Ann, Tit 66, §1102(7) (1959 and Supp 1974-1975). Included in this definition are all companies engaged in providing gas, power, or water; all common carriers, pipeline companies, telephone and telegraph companies, sewage collection and disposal companies, and corporations affiliated with any company engaging in such activities...The incidents of regulation do not appear materially different between enterprises...." 419 U.S. at 350, n. 7.

Similarly, the First Circuit Court of Appeals held in Davis v. Richmond, 512 F.2d 201, 203 (1st Cir. 1975):

"The fact that defendants' conduct [taking possession of a tenant's belongings pursuant to the Massachusetts lien statute] was permitted and regulated by state law--as much private conduct is--does

not by itself make the conduct's connection with the state sufficiently close so that the private conduct 'may be fairly treated as that of the State itself'."

See also Fletcher v. Rhode Island Hospital Trust National Bank, 496 F.2d 927, 932 (1st Cir. 1974), cert. denied, 419 U.S. 1001 (1974), which held that "the mere fact that banks are closely related by the state...and federal government does not render all they do state action."

It is conceivable that Plaintiff's Complaint also alleges that the Defendant has violated her rights under the Fifth Amendment of the Constitution of the United States. The criteria utilized to find federal action sufficient to invoke the Fifth Amendment are the same criteria used to determine the existence of state action under the Fourteenth. Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 487 (9th Cir. 1974); Greenya v. George Washington University, 512 F.2d 556, 559-62 (D.C. Cir. 1975), cert. denied, ---U.S.---, 46 L. Ed. 2d 369 (1975) (instructor employed by private university to teach federal government employees at government facilities held not to be government employee for purposes of Fifth Amendment).

In determining whether the acts of a regulated utility constitute federal government action under the Fifth Amendment, the holdings of Jackson (supra) apply. Brown v. D. C. Transit System, Inc., 523 F.2d 725, 726-29 (D.C. Cir. 1975), cert. denied, ---U.S.---, 46 L. Ed. 2d 91, 96 Sup. Ct. 121 (1975) (applying Jackson to find no federal action under Fifth Amendment by private regulated transit company); Northrip v. Federal National Mortgage Association, 527 F.2d 23, 30-33 (6th Cir.

1975) (applying Jackson to find no federal action under Fifth Amendment).

#### CONCLUSION

Wherefore, respondent respectfully prays that the petition for writ of certiorari be denied.

NEW ENGLAND TELEPHONE AND  
TELEGRAPH COMPANY,  
Respondent

by

Richard H. Wadhams, Jr., Esq.  
Counsel

Dated: March 10, 1978.

AFFIDAVIT OF SERVICE  
AND APPEARANCE

The undersigned hereby enters his appearance in the above captioned matter and affirms that he served the petitioner company by mailing three copies of the foregoing to counsel for petitioners, Norman J. Bernstein, Esq., Londonderry, Vermont 05148, postage prepaid on the \_\_\_\_\_ of March, 1978.

\_\_\_\_\_  
Richard H. Wadhams, Jr.  
Pierson, Affolter & Wadhams  
253 South Union Street  
Burlington, Vermont 05401

Sworn to and subscribed to before me  
this \_\_\_\_\_ day of March, 1978.

\_\_\_\_\_, Notary Public